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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 v.

10 OMAR ALARCON FUENTES,

11 Defendant.

NO: 1:13-CR-0125-TOR-2

ORDER TRANSFERRING
DEFENDANT'S MOTION UNDER
FED. R. CIV. P. 60(b)

12
13 BEFORE THE COURT is Defendant's Motion to Set Aside a Previous
14 § 2255 Judgment Pursuant to Fed. R. Civ. P. 60(b)(4) & (6). ECF No. 279.

15 The Court has reviewed the present motion, the record, and files herein, and
16 is fully informed. For the reasons discussed below Defendant's Motion to Set
17 Aside a Previous § 2255 Judgment Pursuant to Fed. R. Civ. P. 60(b)(4) & (6) (ECF
18 No. 279) will be transferred to the Ninth Circuit Court of Appeals.

19 Defendant previously filed a Motion for Habeas Corpus Pursuant to 28
20 U.S.C. § 2255 on December 21, 2017. ECF No. 262. On May 3, 2018, this Court

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1 denied Petitioner's Motion. ECF No. 270. On August 6, 2018, the Ninth Circuit
2 denied a Certificate of Appealability. ECF No. 275. On September 25, 2018, the
3 Ninth Circuit denied reconsideration and reconsideration *en banc*. ECF No. 276.
4 On April 1, 2019, the Supreme Court of the United States denied the petition for
5 writ of certiorari. ECF No. 278.

6 DISCUSSION

7 The district court lacks authority to review successive habeas motions filed
8 without authorization from the court of appeals. 28 U.S.C. § 2255(h); 28 U.S.C.
9 § 2244(b)(4)(A); see also *United States v. Allen*, 157 F.3d 661, 664 (9th Cir. 1998).
10 The Antiterrorism and Effective Death Penalty Act of 1996 [AEDPA] amended the
11 federal habeas statutes and added the requirement that any prisoner seeking to file
12 a successive habeas application must first file, in the appropriate court of appeals, a
13 motion for an order authorizing the district court to consider the successive
14 application. 28 U.S.C. § 2244(b)(3)(A); Ninth Circuit Rule 22-3(a). Once the
15 applicant files such a motion, the court of appeals then reviews the successive
16 application to determine whether it contains (1) newly discovered evidence that, if
17 proven and viewed in light of the evidence as a whole, would be sufficient to
18 establish by clear and convincing evidence that no reasonable factfinder would
19 have found the movant guilty of the offense; or (2) a new rule of constitutional

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1 law, made retroactive to cases on collateral review by Supreme Court, that was
2 previously unavailable. 28 U.S.C. § 2255(h).

3 Rule 60(b)(4) and (6) provide that a district court may relieve a party from a
4 final judgment, order, or proceeding where the movant has shown . . . (4) the
5 judgment is void; . . . or (6) any other reason justifying relief. A party seeking
6 Rule 60(b)(6) relief must show “‘extraordinary circumstances’ justifying the
7 reopening of a final judgment.” *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005)
8 (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)).

9 A Rule 60(b) motion, however, cannot be used to undermine the limitations
10 on the collateral attack of a federal conviction. A petitioner is generally limited to
11 one motion under § 2255, and may not bring a “second or successive motion”
12 unless it meets the exacting standards of 28 U.S.C. § 2255(h). *United States v.*
13 *Washington*, 653 F.3d 1057, 1059 (9th Cir. 2011). “Because of the difficulty of
14 meeting this standard, petitioners often attempt to characterize their motions in a
15 way that will avoid the strictures of § 2255(h),” for example, by characterizing
16 “their pleading as being a motion under Rule 60(b) of the Federal Rules of Civil
17 Procedure.” *Id.* at 1059.

18 When a Rule 60(b) motion is actually a disguised second or successive
19 § 2255 motion, it must meet the criteria set forth in § 2255(h). *Gonzalez*, 545 U.S.
20 at 528. But the Supreme Court has not adopted a bright-line rule for distinguishing

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1 between a bona fide Rule 60(b) motion and a disguised second or successive
2 § 2255 motion, instead holding that a Rule 60(b) motion that attacks “some defect
3 in the integrity of the federal habeas proceedings” is not a disguised § 2255 motion
4 but rather “has an unquestionably valid role to play in habeas cases.” *Washington*,
5 653 F.3d at 1059–60 (quoting *Gonzalez*, 545 U.S. 532, 534). However, the
6 Supreme Court has instructed that a motion raising an entirely “new claim,” or
7 attacking “the federal court’s resolution of a claim on the merits,” is a disguised
8 second or successive motion. *Gonzalez*, 545 U.S. at 531–32.

9 Here, Mr. Alarcon-Fuentes contends he “is not trying to present a new
10 reason why he should be relieved of either his conviction or his sentence, as
11 provided in 28 U.S.C. § 2255.” ECF No. 279 at 3. He explains that he “is instead
12 trying to reopen his existing Section 2255 proceeding and overcome a procedural
13 barrier to its adjudication since he cannot be convicted on the basis of an
14 uncorroborated admission.” *Id.* Mr. Alarcon-Fuentes, for the first time, contends
15 that his “admission is inadequately corroborated.” *Id.* at 4. That is precisely a new
16 claim that was not presented in his first § 2255 motion, consequently, he is not
17 attacking some defect in the integrity of the first federal habeas proceeding.¹

18
19 ¹ Defendant raised four different issues in his first § 2255 motion: (1) Whether
20 counsel was ineffective for not moving to dismiss the Indictment for allegedly

1 Accordingly, the Court construes Mr. Alarcon-Fuentes' Motion to Set Aside a
2 Previous § 2255 Judgment Pursuant to Fed. R. Civ. P. 60(b)(4) & (6) as a
3 Successive Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C.
4 § 2255.

5 As previously noted, the Court has already denied Mr. Alarcon-Fuentes' first
6 motion under 28 U.S.C. § 2255. ECF No. 270. Neither the record nor any
7 evidence submitted by Mr. Alarcon-Fuentes shows that he obtained the required
8 authorization from the Ninth Circuit. Therefore, this Court does not have
9 jurisdiction to consider his application for relief. Ninth Circuit Rule 22-3(a)
10 provides in part,

11 If an unauthorized second or successive . . . section 2255 motion is
12 submitted to the district court, the district court may, in the interests of
13 justice, refer it to the Court of Appeals.

14 false testimony before the grand jury; (2) Whether counsel was ineffective for
15 failing to move to dismiss for a fatal variance between the Indictment and proof at
16 trial; (3) Whether counsel was ineffective for failing to object to Deputy Hause's
17 testimony about Petitioner's admissions; and (4) Whether counsel was ineffective
18 for failing to challenge the search warrant which allegedly was not supported by
19 probable cause. ECF No. 262 at 2 (incorporating the issues raised in the
20 attachment at ECF No. 262-1).

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1 The Court believes it is in the interest of justice to transfer this case to the
2 Ninth Circuit. *See also* 28 U.S.C. § 1631. In general, the Ninth Circuit has taken a
3 broad view of when transfer is appropriate, recognizing that “[n]ormally transfer
4 will be in the interest of justice because normally dismissal of an action that could
5 be brought elsewhere is ‘time-consuming and justice-defeating.’” *Amity*
6 *Rubberized Pen Co. v. Mkt. Quest Grp. Inc.*, 793 F.3d 991, 996 (9th Cir. 2015)
7 (citation omitted). Transferring Mr. Alarcon-Fuentes’ Motion would expedite a
8 just result in his case.

9 Accordingly, **IT IS HEREBY ORDERED:**

- 10 1. Mr. Alarcon-Fuentes’ Motion to Set Aside a Previous § 2255 Judgment
11 Pursuant to Fed. R. Civ. P. 60(b)(4) & (6) (construed as a Successive
12 Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. §
13 2255), ECF No. 279, shall be terminated in this Court and
14 **TRANSFERRED** to the Ninth Circuit Court of Appeals for
15 determination of whether his Motion should be authorized pursuant to 28
16 U.S.C. § 2255(h).
- 17 2. Mr. Alarcon-Fuentes is advised that this transfer will not itself constitute
18 compliance with 28 U.S.C. § 2255 and Circuit Rule 22-3(a). Mr.
19 Alarcon-Fuentes must still file an application for leave to proceed with
20 the Ninth Circuit and make the showing required by § 2255. The Clerk

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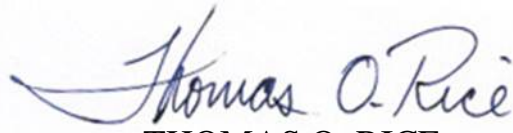
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1 of the Court shall send Mr. Alarcon-Fuentes a copy of the Ninth Circuit
2 **Form 12.**

3 The District Court Executive is directed to enter this Order and provide
4 copies to the parties.

5 **DATED** September 18, 2019.




THOMAS O. RICE
Chief United States District Judge

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